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1983

**Dixie Roblek Lebreton v. Thomas Edward Lebreton : Respondent's
Brief**

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Plaintiff and
Respondent,

- v s -

Defendant and
Appellant.

Case No. 19085

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RESPONDENT'S BRIEF

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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LIXIE ROBLEK LeBRETON, :
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Plaintiff and :
Respondent, :
:
-vs- : Case No. 19085
:
THOMAS EDWARD LeBRETON, :
:
Defendant and :
Appellant. :
:
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RESPONDENT'S BRIEF

APPEAL FROM A JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
THE HONORABLE DEAN E. CONDER, DISTRICT JUDGE

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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:
DIXIE ROBLEK LeBRETON, :
:
Plaintiff and :
Respondent, :
:
-vs- : Case No. 19085
:
THOMAS EDWARD LeBRETON, :
:
Defendant and :
Appellant. :
:
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RESPONDENT'S BRIEF

STATEMENT OF NATURE OF CASE

Appeal from a judgment in a divorce proceeding alleging improper distribution and award of equities in real property.

DISPOSITION IN THE LOWER COURT

Appellant's Order to Show Cause seeking enforcement of an equity distribution under the original Decree of Divorce, was heard in 1978 in the Third Judicial District Court before the Honorable David K. Winder. Appellant's appeal to this Court from an adverse Order resulted in a remand to the district court for further proceedings.

From the Judgment of the Honorable Dean E. Conder Appellant prosecutes this appeal.

RELIEF SOUGHT ON APPEAL

Respondent respectfully requests the Court to affirm the judgment of the trial court and further requests an Order directing the trial court to award attorney's fees to the Respondent as costs pursuant to Rule 68(b) of the Utah Rules of Civil Procedure.

STATEMENT OF FACTS

Respondent and Appellant appeared in the Third Judicial District Court of Salt Lake County on April 29, 1969, before the Honorable Alden J. Anderson for trial on a divorce complaint (R24 and 25).

During said appearance, Appellant and Respondent entered into an oral stipulation wherein Appellant's answer to the Complaint was dismissed (R134 Exhibit D1, p. 2) and Respondent was granted a Decree of Divorce incorporating said stipulation (R134 Exhibit D1, p. 6 and 7).

The Decree of Divorce entered April 28, 1969, specifically provided that the real property acquired by Appellant and Respondent during the course of their marriage be distributed as follows:

With regard to the house, it will be sold upon her remarriage or when the home is no longer needed for the minor children, at which time the home will be sold and the equity as of the date of this divorce will be divided equally among the parties with the further stipulation that the

Plaintiff shall have all of the principal payments made by her after the date of the divorce before the costs of sale and then the remaining equity will be divided equally. (R25).

No objection to this provision was made at any time by the Respondent or his attorney.

On June 15, 1977, an Order to Show Cause was issued by the Third Judicial District Court of Salt Lake County (R38 and 39) based upon Appellant's Affidavit in Support of Order to Show Cause (R36 and 37). The Order to Show Cause issued at Appellant's request, sought enforcement of that provision cited above in the Decree of Divorce by having the home and real property located at 6723 South 2445 East, Salt Lake City, Utah sold and the proceeds of the sale divided equally between the Appellant and Respondent after deducting the balance of principal payments made by Respondent on the mortgage obligation subsequent to entry of the Decree of Divorce (R38).

Appellant's Order to Show Cause came on for hearing April 14, 1978, before the Honorable David K. Winder who found that the provision cited above relating to the distribution of equities in the home, although ambiguous, provided that the equity as of the date of the divorce would be the value to be divided among the parties (R57). The Court further found that the value of the home as of the date of divorce was \$35,000 (R57). Judge Winder, by Order dated May 30, 1978, directed the equity of the home be divided

among the parties by sale or by buy-out, placing a \$35,000 value on the home, minus any amount due and owing on the principal mortgage as of April 28, 1969 (R62). It was further ordered by the trial court that the sum of \$2,160 should be subtracted from Appellant's equity award for delinquent child support payments (R62 and 63). The principal balance owing on the existing mortgage was fixed at \$13,963.44 as of the date of divorce, or April 28, 1969 (R55).

Appellant appealed the Order of Judge Winder on June 26, 1978, and the matter was designated and heard as Case No. 15923 (R64). Following oral arguments, the Order of the District Court was reversed and the case remanded for further proceedings by the District Court consistent with the opinion of this Court (R75).

A hearing was held in the Third Judicial District Court in Salt Lake County before the Honorable Dean E. Conder on January 12, 1983. Pursuant to that hearing, the trial court made certain Findings of Fact which are cited in Appellant's Brief. Pursuant to those findings, judgment was entered on February 15, 1983, in favor of Appellant in the sum of \$6,078.15 with interest at the rate of eight percent (8%) from July 1, 1976 until May 13, 1981, and at the rate of twelve percent (12%) from May 14, 1981 until the present (R101 and 102).

Prior to entry of said judgment, Respondent petitioned the Court for an Award Taxing Attorney's Fees as Costs or for Reconsideration of Judgment pursuant to Rule 68(b) of the Utah Rules of Civil Procedure. The trial court denied that Motion.

ARGUMENT

Point I

THE PROVISION IN THE DECREE OF DIVORCE
DIRECTING SALE OF THE HOME WAS RULED BY
THE UTAH SUPREME COURT TO BE AMBIGUOUS
AND THEREFORE UNENFORCEABLE.

The Appellant argues that the trial court failed to follow the mandate of the Decree of Divorce which directed the sale of the home upon the remarriage of Respondent or when the home was no longer needed for the minor children of the parties. In so arguing, Appellant ignores the prior decisions of both trial courts and the decision of the Utah Supreme Court which ruled that the provision in the Decree of Divorce dealing with the ultimate disposition of the various equities in the home of the parties hopelessly ambiguous and, absent some further evidentiary showing of the actual intent of the parties at the time of the divorce, that provision was unenforceable.

Furthermore, even if the provisions of the original Decree of Divorce had not been ruled ambiguous and therefore unenforceable, the trial court is not bound to a forced sale in order to effectuate a disposition of the respective equities of the parties in any given marital asset. It is a well established principle that it is within the divorce court's prerogative to make whatever disposition of property it deems fair, equitable and necessary for the protection and welfare of the parties; the trial court need not necessarily abide by the terms of an agreement of the parties. Naylor vs. Naylor, 563 P.2d 184 (1977).

In addition, Utah Code Annotated § 30-3-5 (1953, as amended), further provides that subsequent to entry of a Decree of Divorce, the trial court has continuing jurisdiction to make any subsequent changes or modifications with respect to the distribution of the property as may be equitable, reasonable or necessary. This argument is further supported by the Court's decision in Carter vs. Carter, 426 P.2d 35 (1967) where the Court affirmed a trial court's decision to refuse to enforce Divorce Decree language directing the sale of a residence and distribution of the various equities of the parties because of other considerations.

Point II

THE DIVISION OF THE EQUITY OF THE PARTIES AS REFLECTED IN THE JUDGMENT WAS CLEARLY WITHIN THE SOUND DISCRETION OF THE TRIAL COURT

It is a well established principle of law that the division of marital property is a matter that rests largely within the sound discretion of the trial court. Pinney vs. Pinney, 245 P. 329. The trial court in a divorce proceeding has considerable latitude of discretion in adjusting financial and property interests. The Appellant in such a proceeding has the burden to prove that there was a misunderstanding and a misapplication of the law resulting in substantial and prejudicial error, that the evidence presented clearly preponderated against the Findings of Fact, or that the judgment of the trial court created such a serious inequity as to manifest a clear abuse of discretion. English vs. English, 565 P. 2d 409 (1977), also cited in Pope vs. Pope, 589 P. 2d 752 (1978).

The Appellant offers no rational basis or argument for suggesting that the trial court failed in applying any of the foregoing standards. The trial court made its decision to distribute the equity in the residence based upon the relative contributions of each party toward payment of the original mortgage principal. The contribution of each party was fixed, and each party shared equally in any further appreciation of their investment according to their percentage contribution.

The Appellant infers that the Respondent was awarded a disproportionate share of the equity in the home, nevertheless had the Appellant received his equity at the time of the divorce, or \$3,700, and had invested that sum in a financial institution at the highest rate of interest, his return under that arrangement would not exceed the amount awarded to him by the trial court in this proceeding. Consequently, Appellant exceeds the bounds of fairness in inferring that the decision of the trial court imposes an injustice upon him in its decision. Consequently, the trial court's award of \$8,490 is clearly within the sound discretion of the Court and constitutes a fair and just return to the Appellant based upon the amount of his original equity at the time of the divorce.

Point III

THE TRIAL COURT ABUSED ITS DISCRETION
IN DENYING RESPONDENT'S MOTION FOR AWARD
TAXING ATTORNEY'S FEES AS COSTS OR FOR
RECONSIDERATION OF JUDGMENT.

The trial court immediately prior to entering judgment in this matter denied Respondent's Motion for an Award Taxing Attorney's Fees as Costs or for Reconsideration of Judgment pursuant to Rule 68(b) of the Utah Rules of Civil Procedure in the sum of \$11,500.00. That letter was mailed to Appellant's attorney and filed with the district court.

and is part of the record in this matter. Appellant failed to accept that offer within the time allowed, and the trial court subsequently awarded a sum substantially less than that offered.

Rule 68, in instances where an offer of judgment has been made and rejected by the offeree prior to trial, requires that costs to awarded to the offeror where a judgment finally obtained is less favorable than the offer. The Rule specifically states that the offeree is then responsible for all costs incurred after the making of the offer. The amount recovered by the Appellant in this matter was substantially less than the amount offered in Respondent's offer of judgment. Consequently, Respondent is clearly entitled to an award of costs incurred subsequent to the date of the offer.

Respondent seeks to have her attorney's fees incurred after October 21, 1982, taxed as costs to the aforementioned judgment. While there appears to be no specific statutory definition of "costs", the Utah Supreme Court in Hull vs. Goodman, 290 P. 2d 245, interpreted Rule 54, U.R.C.P, as leaving "the question of costs somewhat in the discretion of the courts." However, it has long been the basic rule in the State of Utah that "attorney's fees are not to be allowed unless they are provided for by contract or by statute or where they are a legitimate item of damages caused by the other party's wrongful act. As an extension of the latter proposition, we have no doubt that the statutory

authorization to award such 'costs as may seem equitable and just' may include an award of attorney's fees if they were necessarily incurred because of litigation which was not resorted to in good faith, but was merely spiteful, contentious or obstructive". Western Casualty & Surety Co. vs. Marchant, 615 P. 2d 423, 427 (1980).

Respondent would submit that attorney's fees may be allowed or taxes as costs based upon statute and upon failure of the Appellant to exercise good faith. First, this matter is simply a continuation of a prior divorce proceeding commenced more than fifteen years ago but never resolved. Attorney's fees are clearly allowable in cases of this nature based upon the sound discretion of the Court and upon the equities before it.

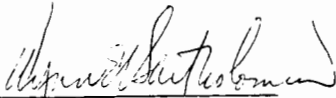
Second, this matter is more particularly a partition proceeding wearing the "clothes" of a domestic civil case. Utah Code Annotated § 78-39-45 (1953, as amended) specifically provides for the payment of attorney's fees as a cost of partition in such proceedings. While this action is not filed as a partition proceeding, it is in essence exactly that situation where the owners of real property and judicial assistance to resolve disputes and fix their respective equities in real property. Third, this action is analogous to a quiet title action where attorney's fees may be awarded as a measure of damages under Utah law.

Finally, Respondent would submit that the Appellant has not proceeded in this case in good faith. At the trial of this matter held January 12, 1983, neither Appellant nor his attorney presented any reasonable or rational basis for his claim, presented no direct or rebuttal evidence, and merely argued that the real property should be sold and the current equity divided after allowing the Respondent \$13,963.44 without interest. Furthermore, Appellant has repeatedly delayed or failed to take action to move this matter along in an expeditious manner. The Supreme Court filed its decision on November 20, 1979, remanding this case for an additional hearing. What should have been disposed of within three months has taken over three years. Respondent would argue that Appellant's primary purpose in this delay was to intentionally vex, harass and annoy the Respondent, and cause her great concern and worry about losing her home.

CONCLUSION

Respondent requests that the judgment of the trial court be affirmed and that the issue of attorney's fees be remanded to the trial court for further proceedings to determine the amount to be taxed and awarded to Respondent as costs.

Respectfully submitted,


WYNN E. BARTHOLOMEW
Attorney for Respondent
, and Plaintiff

CERTIFICATE OF DELIVERY

I hereby certify that I caused to be delivered two (2) true and correct copies of Respondent's Brief this 20th day of September, 1983, to Don Blackham, Blackham and Boley, 3535 South 3200 West, Salt Lake City, Utah 84119.

